Supreme Court, U.S.
FILED

10-358 SEP 15 2010

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No.

IN THE
Supreme Court of the United States

ALLAN R. DUNN, M.D., P.A.,
a Florida corporation and
ALLAN R. DUNN, M.D., individually,

Petitioners,

-vs.-

EVA G. SZIRANYI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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The Petitioners Allan R. Dunn, M.D., P.A. and Allan R. Dunn, M.D. petition the Court to review a judgment of the Eleventh Circuit Court of Appeals and to answer the following question in the affirmative:

QUESTION PRESENTED

I. Whether the Eleventh Circuit's imposition of statutory penalties under ERISA in excess of 100 times the value of the compensatory award to the Plaintiff violates due process?

PARTIES TO THE PROCEEDING BELOW

The parties to this proceeding are, as identified in the caption of the case, the Petitioners (Appellants below), Allan R. Dunn, M.D., P.A. and Allan R. Dunn, M.D., and the Respondent (Appellee below) is Eva G. Sziranyi.

CERTIFICATE OF INTERESTED PERSONS/ CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the following is a list of persons and entities having an interest in the outcome of this appeal.

1. Allan R. Dunn, M.D., P.A., Defendant/Petitioner
2. Brown III, Connis O., Counsel for Plaintiff/Respondent
3. Brown Robert, LLP, Counsel for Plaintiff/Respondent
4. Cady, Vanessa M., Counsel for Plaintiff/Respondent
5. Dunn, Allan R. M.D., Defendant/Petitioner
6. Graham, Hon. Donald L., District Court Judge
7. Israel, David Ben, Counsel for Plaintiff/Respondent
8. Johnson, Hon. Sterling Jr., District Court Judge
9. Majewski, Annabel C., Counsel for Defendants/Petitioners
10. Manzo, Christine Michelle, Counsel for Plaintiff/Respondent
11. Robert, Seth Peter, Counsel for Plaintiff/Respondent
12. Smith, Lawrence D., Trial Counsel for

Defendants

13. Sziranyi, Eva G., Plaintiff/Respondent
14. Torres, Hon. Edwin G., Magistrate Judge
15. Wasson, Roy D., Counsel for Defendants/Petitioners
16. Wasson & Associates, Chartered, Counsel for Defendants/Petitioners

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO PROCEEDINGS BELOW ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES. v

REPORTS OF OPINIONS BELOW 1

STATEMENT OF BASIS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

THIS COURT SHOULD GRANT THE WRIT
BECAUSE THE IMPOSITION OF $142,780 IN
PENALTIES IN A CASE INVOLVING
A COMPENSATORY AWARD OF $1,362.77
IS AN EXCESS PUNISHMENT WHICH
VIOLATES DUE PROCESS 11

CONCLUSION 18

Appendix

Eleventh Circuit Court Opinion. A-1
Southern District Court of Florida Opinion. A-3

TABLE OF AUTHORITIES

CASES — PAGE

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) . . . . . : 13

Browning-Ferris Inds. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) . . . . . : 14

Daughtrey v. Honeywell, Inc., 3 F.3d 1488 (11th Cir. 1993) . . . . . : 12, 14, 16

DeLoach v. Bevers, 922 F.2d 618 (10th Cir. 1990) . . . . . : 17

Direct TV v. Gonzalez, No. Civ. A. SA-03-1170; 2004 U.S. Dist. LEXIS 16734 (W.D. Tex. Aug. 23, 2004) . . . . . : 14

In Re Marriage of Miller, 879 N.E.2d 292 (Ill. 2007) . . . . . : 15

Leiber v. Bertelsmannag, Nos. C MDL-00-1369 MHP & C 04-1671 MHP; 2005 U.S. Dist. LEXIS 11498 (M.D. Cal. June 1, 2005) . . . . . : 14

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) . . . . . : 18

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) . . . . . : 14

Parker v. Time Warner Entertainment Co., 331 F.3d 13 (2d Cir. 2003) . . . . . : 14

Scott v. Suncoast Beverage Sales, Ltd.,
295 F.3d 1223 (11th Cir. 2002) . . . . . : 16

St. Louis, Iron Mountain & S. Ry. Co. v. Williams,
251 U.S. 63 (1919) . . . . . : 15

State Farm Mut. Auto. Ins. v. Campbell,
538 U.S. 408 (2003) . . . . . : 13, 14

TXO Production Corp. v. Alliance Resources Corp.,
509 U.S. 443, 453-454 (1993) . . . . . : 15

Union Planters Bank, N.A. v. Hutson,
210 S.W.3d 163 (Ky. App. 2006) . . . . . : 15

OTHER AUTHORITIES **PAGE**

U.S. Const. amend. V . . . . . : 2

28 U.S.C. §1254(1) . . . . . : 2

28 U.S.C. § 1291 . . . . . : 1

28 U.S.C. §1331 . . . . . : 1

29 U.S.C. §1001 . . . . . : 4

29 U.S.C. §1132 . . . . . : *passim*

Debt Collection Improvement Act of 1996
(Pub. L. No. 104-134, 110 Stat. 1321-73) . . . . . : 5

62 Fed. Reg. 40,695 (July 29, 1997) . . . . . : 5

OPINIONS BELOW

The opinion of the Eleventh Circuit giving rise to this petition is *Sziranyi v. Dunn*, No. 09-16085; 2010 U.S. App. LEXIS 12504 (11th Cir. June 17, 2010). *See* A-1.

An earlier reported opinion in this case is *Sziranyi v. Dunn*, 2009 U.S. Dist. LEXIS 128536 (S.D. Fla. September 30, 2009). *See* A-7.

STATEMENT OF BASIS FOR JURISDICTION

The judgment or order sought to be reviewed is the decision of the Eleventh Circuit Court of Appeals which was entered on June 17, 2010.

The Eleventh Circuit issued its judgment as its mandate on June 17, 2010.

The district court had federal question jurisdiction over this action pursuant to 28 U.S.C. §1331.

The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291 for review of a final judgment of the district court in a civil action, and said jurisdiction was invoked by filing on October 28, 2009 of a notice of appeal within thirty days of the entry of the order disposing of the Appellants' Motion for Rehearing or New Trial on September 30, 2009.

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. §1254(1)(2010).

Certiorari consideration is sought pursuant to S. Ct. R. 10(c).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice be put in jeopardy of life or limb; not shall be compelled in a criminal case to be a witness against himself, ***nor be deprived of life, liberty or property, without due process of law***; nor shall private property be taken for public use, without just compensation.

(Emphasis added).

29 U.S.C. §1132(a)(1):

(a) Person empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms

of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. §1132(c)(1):

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form.

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606, section 101(e)(1), section 101(f), or section 105(a) [29 USCS §1166(a)(1) or (4), 1021(e)(1), 1021(f), or 1025(a)] with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below:

The Plaintiff Sziranyi sued the Defendants for violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq.

The case proceeded to trial on the Second Amended Complaint. That complaint contained three counts—Count I was "an action for refusal to supply requested information pursuant to 29 U.S.C. § 1132(c) and for statutorily provided monetary damages and penalties" against the Defendant Allan R. Dunn, M.D., individually ("Dr. Dunn"). Count II was a similar count against Dr. Dunn's professional association, Allan R. Dunn, M.D., P.A. ("Dunn P.A."). Count III was a count for breach of contract for failing to pay all benefits due to Ms. Sziranyi under the Keogh Plan maintained by the Defendants.

The Defendants in their Answer to Second Amended Complaint admitted that Dr. Dunn had paid the Plaintiff a bonus of $2,600 and placed those funds into her retirement account. The Defendants further admitted that the Plaintiff retired from Dr. Dunn's employ on May 13, 2005 and Dr. Dunn paid her the principal sum of that retirement contribution, $2,600.

Dr. Dunn denied liability to the Plaintiff and raised defenses, including the defense that "[a]ny mistake or failure on the part of Dr. Dunn was done innocently and without malice or bad faith, Dr. Dunn believing that he had fully and in good faith discharged his obligations to the Plaintiff under the plan."

The Plaintiff also asserted causes of action for

breach of contract, which were dismissed by the district court as preempted under federal law. The remaining ERISA issues came before visiting District Judge Sterling Johnson, Jr. for trial on August 13, 2009.

Following trial, Judge Johnson concluded "that Plaintiff has established a violation of 29 U.S.C. §§ 1132(a) [&] 1132(c) for Defendants' failure to pay Plaintiff benefits and for Defendants' failure to supply Plaintiff with requested plan documentation." The district court found that the circumstances of this case render it "such an action where the maximum penalty permitted under law ought to be imposed." The court noted that "[a]s stipulated to, Defendants are, as an initial matter, liable to Plaintiff in the amount of $1,363.77, representing the balance due as of December 31, 2007 (the 'Unpaid Benefits')." The court awarded prejudgment interest using the Florida state statutory rates of interest. Further, the court awarded statutory penalties of $110 per day[1] beginning March 12, 2006 and ending on the date of the order, rendered on September 30, 2009.

The total award of damages, prejudgment interest, and statutory penalties is $144,383.77.

Petitioner appealed to the Eleventh Circuit which succinctly affirmed:

> This is an appeal from the final judgment in an Employee Retirement

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[1] Although the stated penalty in the ERISA statute is "up to $100 a day," the civil monetary penalties under Title I of ERISA were increased to $110 a day by the Federal Civil Penalties Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, 110 Stat. 1321-73). *See also* 62 Fed. Reg. 40,695 (July 29, 1997).

Income Security case. The district court imposed against the defendants the maximum statutory penalty provided for the violation of 29 U.S.C. §1132(a) and (c) for the defendants' failure to pay the plaintiff benefits and for the defendants' failure to provide plaintiff with the documentation she requested. The defendants contend that the district court abused its discretion in imposing a penalty, $142,780, and clearly erred in finding that Allan R. Dunn, M.D., P.A., was a plan administrator subject to the statutory penalty.

Having considered the district court's decision, in particular the court's findings of fact and conclusions of law, the parties' briefs, and the relevant portions of the record, we find no merit in the defendants' contentions and, accordingly affirm the judgment.

B. Statement of the Facts[2]:

1. Plaintiff was employed by Dr. Dunn's orthopedic surgery practice from 1992 through 2005. She assisted him with patients receiving physical

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[2] These numbered paragraphs of facts are taken verbatim from the district court's decision as adopted by the Eleventh Circuit decision under review in this case. A-1, *et seq.* At the conclusion of those quoted findings the Petitioner will add some additional relevant facts.

therapy in addition to performing clerical duties.

3. On October 15, 1996, Defendant gave Plaintiff a note which read: "I paid you a bonus into the Keogh plan. 1995. You are welcome!!" 1.) The contribution had been made into the "Allan R. Dunn, M.D., Profit Sharing Plan," held by First Union Capital Management Group (the "Profit Sharing Plan" or the "Plan"). The Plan permits contributions by the employer at the employer's sole discretion. The "bonus" referred to in the Note is reflected in a check for $18,726.00 signed by Defendant Dunn and made payable to the "Allan R. Dunn M.D. Profit Sharing Keogh." Of the $18,726.00, Defendant Dunn intended that $16,105.00 be applied to himself and the remainder ($2,621.00) to be applied to the Plaintiff.

4. At the time she received the Note, Plaintiff did not know that a Keogh plan was a type of employee benefits plan. She learned from a co-worker that it was a "retirement pension" and attempted unsuccessfully to find out the details from Defendant.

5. Thus, Plaintiff did not receive annual statements, options as to how she might invest, a description of the Plan, or names or numbers of any plan administrator or other account representative, notwithstanding her frequent inquiries as to same.

* * *

17. Plaintiff retired on May 13, 2005. When she announced her retirement to Defendant, he did not recall the Note. Plaintiff found the Note and presented it to Defendant, who still did not recall writing the Note, but admitted that it was written in his handwriting.

18. On the day of her retirement, Defendant provided Plaintiff with a check for $2,600, drawn on his personal bank account, and indicating in the "memo" line that the check was for "Keogh Withdrawal."

19. After her retirement, Plaintiff contacted an attorney, who wrote Dr. Dunn on February 9, 2006, requesting information on the Plan. Specifically, Plaintiff's counsel requested "(1) Keogh Plan documentation with amendments; (2) annual statements and account record; (3) [Internal Revenue Service] Form 5500s; (4) Records of annual contributions; and (5) Participant Statement."

20. Counsel for Plaintiff again wrote to Dr. Dunn (this time at both his business and home addresses) on March 2, 2006, requesting the same information.

21. Defendant Dunn's daughter, Melissa Dunn, responded to Plaintiff's counsel on June 12, 2006, with a memorandum that read: "Enclosed is First Union's Basic Plan Document that Dr.

Dunn found."

22. Dunn's Response did not address the inquiries of Plaintiff's letters or provide the documentation requested therein.

23. On May 28, 2008, ten months after commencement of this action, Dunn submitted to the Employee Benefit Security Administration eleven past-due Internal Revenue Service Forms 5500, for each year beginning with 1995 and ending with 2005).

24. The Form 5500s, filled out on behalf of the "Allan R. Dunn, M.D. Profit Sharing Plan," bore an Employer Identification Number identical to that used in the registration of the P.A. with the Florida Department of State.

* * *

26. Defendant Dunn's submissions to the Employee Retirement Benefit Administration purported to include "appropriate schedules and attachments." No schedules or attachments were provided to Plaintiff.

27. As Plan Administrator and employer, Defendant Dunn understood that he was required to provide plan statements, including information on how the employees' investments were doing. Defendant did not provide Plaintiff with annual statements or the status of her investment. Indeed, Plaintiff received no Plan

documentation.

28. Moreover, when Defendant Dunn claims he was "going broke," he withdrew funds from the account containing Plaintiff's retirement funds without informing her. Dunn did not consider the withdrawal to be "any of [Plaintiff's] business."

29. Defendant Dunn testified that after realizing his "mistake" in giving Plaintiff only the principal balance upon her retirement, he "immediately went to the accounts and . . . made a compound interest statement demonstrating every year, the 2 percent, 3 percent . . . of compound interest plus the principle [sic] and then another interest on top of that."

30. As a result, Dr. Dunn wrote to Plaintiff's counsel on August 8, 2007, offering Plaintiff $456.00, representing what Dunn believed to be the interest due Plaintiff on the initial Plan deposit.

31. The parties have stipulated that the amount due Plaintiff from the Plan was, as of December 31, 2007, $1,363.77.

Dr. Dunn is currently over 70 years old and semi-retired from his small orthopedic surgery practice. He suffers from COPD and asthma and has had an emotional breakdown caused by the lawsuit. He attributed his lack of attention to plan administration to not fully understanding his duties or

how the plan worked.

The Plaintiff worked for Dr. Dunn for 13 years. During those years, Dr. Dunn contributed to the Keogh Plan only twice—once in 1992 and once in 1996; the 1996 contribution included $2,600 for the Plaintiff.

Dr. Dunn had made several attempts to resolve the matters prior to trial, to no avail.

The court entered final judgment in favor of the Plaintiff and assessed the maximum penalty from the date of Plaintiff's request for documentation (which was partially complied with) until the date of final judgment, rather than for only the period of time which Dr. Dunn had failed to provide the plan documentation. The court also made a discretionary award of $99,000 for Plaintiff's trial-level attorneys' fees. Appellate fees were awarded in the sum of $12,597.50. The total award to Plaintiff on the disputed amount of $907.77 in interest was therefore $254,377.

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE IMPOSITION OF $142,780 IN PENALTIES IN A CASE INVOLVING A COMPENSATORY AWARD OF ONLY $1,362.77 IS AN EXCESS PUNISHMENT WHICH VIOLATES DUE PROCESS AND CONFLICTS WITH THIS COURT'S DECISIONS REGARDING AWARDS OF PUNITIVE DAMAGES

Imposition of a penalty of more than one hundred times the amount of the compensatory award to the Plaintiff conflicts with this Court's numerous

decisions as to the constitutionality of punitive damages. The penalty provided by "section 1132(c) is intended to punish non-compliance with the employer or administrator's disclosure obligations and not to compensate the participant." *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1494 (11th Cir. 1993).

Because the statutory penalty is intended to punish a plan administrator, as opposed to compensating the participant, the case law involving awards of punitive damages is relevant to determining the excessiveness of the award. In studying the ratios of punitive damages to compensatory damages in cases nationwide "cover[ing] cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness and even gross negligence in some jurisdictions[, t]he data put the median ratio for the entire gamut of circumstances at less than 1:1 . . . , meaning the that the compensatory award exceeds the punitive award in most cases." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 598 (2008).

In reversing a $2.5 billion punitive damage award under federal maritime law, where the relevant compensatory damages were $507.5 million, this Court held that "the constitutional outer limit may well be 1:1." *Id.* at 599. The award of statutory penalties against the Defendants in this case totaling more than one hundred times the compensatory award to the Plaintiff operates to deny the Defendants due process of law and violates the Fifth Amendment of the Constitution which prohibits excessive punishments. The punishment of Defendants is comparable to the

injustice visited upon Jean Valjean.[3] The American justice system is far too civilized to allow such an unjust sanction to stand. Therefore, the amount of the penalty should be reversed with instructions to reduce the statutory penalty.

The ratio of the statutory penalty to the actual damages in this case is similar to that found to be unconstitutionally excessive in *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408 (2003). There, this Court reversed the award of $145 million in punitive damages in a case in which the compensatory damages totaled $1 million. The Court found that the governmental interest in deterring bad conduct would have been satisfied by a much lower award, suggesting that, while there is no bright-line rule, "single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range . . . in this case, of 145 to 1." *Id.* at 425.

In *Campbell*, this Court applied the guideposts it had previously set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). 538 U.S. at 418. This Court has determined that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id. citing Gore* at 575. The Court should consider whether the harm was physical or economic; whether the conduct evinced an indifference or reckless disregard to the safety or health of others; whether the conduct was an isolated

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[3] *See* Victor Hugo, *Les Misèrables* (1862)(defendant sentenced to prison terms totaling 19 years, including extensions for attempted escapes, for theft of loaf of bread).

incident; and whether the harm resulted from intentional malice, trickery, deceit, or merely from accident. "[T]he absence of these factors renders any award suspect." *Id.* at 419.

In this case, the harm was only economic—$1,363.77. Dr. Dunn's failure to provide the requested documentation was an isolated incident and resulted from lack of knowledge rather than intentional malice. Therefore, the imposition of maximum penalty is unwarranted.

Although there are no cases directly holding that Supreme Court precedents such as *Campbell* and *Exxon Shipping Co.* are binding on courts awarding statutory damages, some courts have suggested that precedents such as those apply to statutory-damage awards. *See Parker v. Time Warner Entertainment Co.*, 331 F.3d 13, 22 (2d Cir. 2003)(due process may require courts to reduce a statutory-damage award "in a sufficiently serious case"); *Leiber v. Bertelsmannag*, Nos. C MDL-00-1369 MHP & C 04-1671 MHP; 2005 U.S. Dist. LEXIS 11498 (M.D. Cal. June 1, 2005); *Direct TV v. Gonzalez*, No. Civ. A. SA-03-1170; 2004 U.S. Dist. LEXIS 16734 (W.D. Tex. Aug. 23, 2004).

Even though the penalty awarded in this case was pursuant to a statute, as opposed to being a common law punitive damage award, this Court should utilize the same basic analysis in place to limit punitive damages. This Court has recognized that authority exists in its opinions that the "Due Process Clause may appropriately place outer limits on the size of civil damages that may be awarded pursuant to a statutory scheme." *See Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 9 (1991) *citing Browning-Ferris Inds. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257,

276-77 (1989).

This Court has issued numerous opinions stating that the Due Process Clause imposes substantive limits "beyond which penalties may not go." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-454 (1993). *(Quoting Sea Board Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907)). *See also, St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 286 (1912). "Morover, in *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 59 L. Ed. 1419, 25 S. Ct. 886 (1915), the Court actually set aside a penalty imposed on a telephone company on the ground that it was so 'plainly arbitrary and oppressive' as to violate the Due Process Clause." *TXO* 509 U.S. at 454.

State and federal courts throughout the United States have concluded without exception "that a statutory penalty which is 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable' will run afoul of the due process clause." *In Re Marriage of Miller*, 879 N.E.2d 292, 300 (Ill. 2007). "Such a penalty . . . , 'does not further a legitimate government purpose' . . . , and thus fails the rational basis test." *Id.* at 301. *Accord, Union Planters Bank, N.A. v. Hutson*, 210 S.W.3d 163, 167 (Ky. App. 2006)(reversing civil penalty of $100 per day totaling $98,000 for bank's failure to timely release mortgage after underlying note was satisfied for determination of plaintiff's good faith).

The lead federal case on the subject is this Court's decision in *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919). In that case the Court held that a statutory penalty violates due

process "where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."

As is the case with punitive damages, the "[p]enalty under §1132 is meant to be ***in the nature of punitive damages*** designed more for the purpose of punishing the violator than compensating the participant or beneficiary." *Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223, 1232 (11th Cir. 2002)(emphasis added). No punitive damage case decided by this Court has approved an award of many multiples of actual damages.

In 2005, when Plaintiff retired, Dr. Dunn gave her a check for $2,600 from his personal account, after being reminded by Plaintiff of her share of the plan. By that time, Dr. Dunn had forgotten the voluntary contribution made nine years previously.

Upon request, Dr. Dunn sent the basic plan document—a basic ERISA plan—to Plaintiff's attorney.

Plaintiff filed suit in July 2007. At that point, Dr. Dunn realized that he owed Plaintiff interest, which he calculated at 2%–3% and tendered a check for $456. Dr. Dunn derived the annual return he used in his calculations from bank statements. Litigation continued for two years basically to recover $907.77 claimed interest still owed on the $2,600 investment.

The maximum statutory penalty of $110 per day may be appropriate for a multi-million dollar corporation with thousands of employees that fails to provide documentation. It is not appropriate in a case such as this where the plan administrator is a retirement-age sole practitioner. Punitive damages "are to punish and not to bankrupt a defendant against

whom they are awarded." *DeLoach v. Bevers*, 922 F.2d 618, 623 (10th Cir. 1990).

Further, to the extent that the statutory penalty was imposed as punishment for Dr. Dunn's failure to provide plan documentation (as opposed to his failure to remit payment of the proper amount of interest on the funds), it was wholly arbitrary and capricious because the documentation in question did not exist. It was impossible for Dr. Dunn to timely provide documentation that had not been created in the first place. Additionally, Dr. Dunn paid a $1,500 penalty when he did file the Form 5500s, in effect being fined twice for not providing documentation.

Although some penalty would be appropriate to punish a plan administrator for failure to prepare required documentation, the calculation of that penalty should not be based on an infinite time period. Nor should the penalty be based simply on the arbitrary date of the entry of judgment on the claim, as it was here, because that date is wholly out of the control of the Defendant. Additionally, such a method for calculating the penalty acts as a incentive to a plaintiff to prolong litigation in order to maximize the award.[4] The punishment for failure to create the documents in the first place cannot be a never-ending liability for daily statutory penalties.

Even though Dr. Dunn did not have the requested plan documentation to be provided to the

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[4] That was the case here; even after all available documentation was provided and the Defendants acknowledged the amount of interest still owing, Plaintiff proceeded with prolonged litigation in order to recover statutory penalties as well.

Plaintiff, the substantial equivalent of the information those documents would have contained was provided to the Plaintiff long before the trial of this action. Early in 2008 Dr. Dunn produced in discovery copies of the Retirement Statements introduced into evidence as Defendants' Ex. F. Dr. Dunn stipulated long before trial that "he owed the Plaintiff $1,347.00 constituting the accrued interest on the investment of $2,600.00 which was the sole investment made by him during the course of Plaintiff's participation in the plan." The Defendants should not have been punished by a daily penalty up to the day of trial for failing to produce information that would have informed the Plaintiff of nothing more than that to which the parties had agreed long before trial.

The purpose of punitive damages is as much deterrence as it is punishment. *See Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981). Dr. Dunn is an elderly solo practitioner who was unsophisticated in matters pertaining to ERISA plan administration. To punish him at the same level as might be appropriate to punish a sophisticated plan administrator of a Fortune 500 company would be utterly unfair. A much lesser penalty would have as much deterrent effect as a greater penalty, because Dr. Dunn is not likely to start any new plan at this late stage in his career as a sole proprietor. Thus, there is no purpose served by such a grossly excessive penalty.

CONCLUSION

WHEREFORE, there being a likely violation of the Fifth Amendment, this Court should grant the writ and consider the issues on the merits.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Eleventh Circuit Court Opinion. A-1

Southern District Court of Florida Opinion. A-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-16085
Non-Argument Calendar

D.C. Docket No. 07-21762-CV-DLG

EVA G. SZIRANYI,

Plaintiff-Appellee,

versus

ALLAN R. DUNN, M.D. P.A.,
A Florida profit corporation,
ALLAN R. DUNN, M.D.,
Individually,

Defendants-Appellants,

Appeal from the United States District Court
for the Southern District of Florida
(June 17, 2010)

Before TJOFLAT, BIRCH and ANDERSON, Circuit Judges.

PER CURIAM:

This is an appeal from the final judgment in an Employee Retirement Income Security case. The

district court imposed against the defendants the maximum statutory penalty provided for the violation of 29 U.S.C. §1132(a) and (c) for the defendants' failure to pay the plaintiff benefits and for the defendants' failure to provide plaintiff with the documentation she requested. The defendants contend that the district court abused its discretion in imposing a penalty, $142,780, and clearly erred in finding that Allan R. Dunn, M.D., P.A., was a plan administrator subject to the statutory penalty.

Having considered the district court's decision, in particular the court's findings of fact and conclusions of law, the parties briefs, and the relevant portions of the record, we find no merit in the defendants' contentions and, accordingly affirm the judgment.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 07-civ-21762 (SJ)

EVA G. SZIRANYI,

Plaintiff,

v.

ALLAN R. DUNN, M.D., P.A., a Florida profit corporation, and ALLAN R. DUNN, M.D., Individually,

Defendants.
_____/

DECISION AND ORDER

JOHNSON, Senior District Judge:

INTRODUCTION

Plaintiff, Eva Sziranyi ("Plaintiff" or "Sziranyi"), filed this action on July 9, 2007 seeking to recover from her former employer the benefits of a retirement plan. The action, brought pursuant to the Employee's Retirement Investment Security Act ("ERISA"), 29 U.S.C. § 1001, et seq., included causes of action for breach of contract, which were dismissed as pre-empted by then-presiding District Judge Donald L. Graham. The remaining issues came before the undersigned on August 13, 2008

for a bench trial.

Plaintiff Sziranyi presented three witnesses: herself; Blanche Abrams ("Abrams"), another former employee of defendant Dr. Dunn ("Dunn" or "Defendant Dunn"); and Dunn himself. Plaintiff and Abrams testified that, during their term of employment at Dunn's medical practice (defendant "Allan R. Dunn, M.D, P.A." (the "PA")), they were each told of the existence of a retirement account for their benefit and they received little or no benefits upon retirement. (Defendant Dunn and Defendant PA will hereinafter be referred to collectively as "Defendants.")

Defendants presented no witnesses.

At trial, the Court had an opportunity to observe witness demeanor and found Sziranyi and Abrahams to be credible and forthright in their answers to inquiries from the attorneys as well as from the Court. The same could not be said of Defendant Dunn.

As more fully explained below, the Court concludes, based on the evidence and testimony presented at trial, in addition to the post-trial memoranda submitted by the parties, that Plaintiff has established a violation of 29 U.S.C. §§ 1132(a), 1132(c) for Defendants' failure to pay Plaintiff's benefits and for Defendants' failure to supply Plaintiff with requested plan documentation. Pursuant to Federal Rule of Civil Procedure 52(a), the Court's findings of fact and conclusions of law follow.

FINDINGS OF FACT[1]

1. Plaintiff was employed by Dr. Dunn's orthopedic surgery practice from 1992 through 2005. (Stip. P 8.) She assisted him with patients receiving physical therapy in addition to performing clerical duties. (Transcript of Proceedings dated August 13, 2009 ("Tr.") at 29.)

2. Plaintiff accepted the position in large part because Defendant Dunn promised that, in time, she would be eligible for retirement benefits, which she deemed important, given her then-age of 54. (Tr. 21-22.)

3. On October 15, 1996, Defendant gave Plaintiff a note which read: "I paid you a bonus into the KEOGH plan. 1995. You are welcome!!" (the "Note") (Pl. Trial Ex. ("Pl. Ex.") 1.) The contribution had been made into the "Allan R. Dunn, M.D., Profit Sharing Plan," held by First Union Capital Management Group (the "Profit Sharing Plan" or the "Plan"). The Plan permits contributions by the employer at the employer's sole discretion. (Stip. PP 2, 9; Pl. Ex. 7.) The "bonus" referred to in the Note is reflected in a check for $ 18,726.00 signed by Defendant Dunn and made payable to the "Allan R. Dunn M.D. Profit Sharing KEOGH." (Pl. Tr. Ex. 31.) Of the $ 18,726.00, Defendant Dunn intended that $ 16,105.00 be applied to himself and the remainder ($ 2,621.00) to be applied to Plaintiff. (Pl. Ex. 31.)

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[1] The parties' pre-trial stipulation (Docket No. 141) has been adopted by the Court and incorporated in the Findings of Fact as indicated.

4. At the time she received the Note, Plaintiff did not know that a KEOGH plan was a type of employee benefits plan. She learned from a co-worker that it was a "retirement pension" and attempted unsuccessfully to find out the details from Defendant. (Tr. 27-28.)

5. Thus, Plaintiff did not receive annual statements, options as to how she might invest, a description of the Plan, or names or numbers of any plan administrator or other account representative, notwithstanding her frequent inquiries as to same. (Tr. 28-30.)

6. On or about September 26, 2003, Defendant Dunn executed another plan document (the "Second Plan Agreement"). (Pl. Ex. 22.) Dr. Dunn indicated that the name of the plan to be associated with Second Plan Agreement was "Allan R. Dunn, M.D., Profit Sharing Plan." (Id.) This is the same name as the one he used to set up the Profit Sharing Plan.

7. Section 1 of the Second Plan Agreement (entitled "Effective Dates") instructs the employer to either indicate the start date of the original plan ("Part A"), or (in the case of a restatement of a prior plan), to indicate the start date of the prior plan in addition to the start date for restatement ("Part B"). (Id.) Thus, Part A asked for one date, and Part B asked for two.

8. Dr. Dunn filled out Part A and provided only one of the two dates requested in Part B. (Id.)

9. By filling out both components of an "either/or" section (and by filling out one of them incompletely), Dr. Dunn's response to the Effective Date fields in the

Second Plan Agreement was ambiguous. Moreover, by filling out Part B incompletely, he indicated that the Second Plan Agreement was a "restatement" but failed to indicate the date of the original plan he purported to restate. (Id.) Contrarily, he testified that he had only one retirement plan "throughout." (Tr. 52:12-16.)

10. "Allan R. Dunn, M.D." was listed as both the "employer" and "trustee" under the Second Plan Agreement, and, in executing the instrument, Dr. Dunn indicated that his title was "Owner." (Pl. Ex. 22 at 4.)

11. Notwithstanding his affirmation that he was the "Owner" of "Allan R. Dunn, M.D.," Dr. Dunn testified that "Allan R. Dunn, M.D., P.A." "was a ghost;" "wasn't used at all;" "was never utilized;" and that he did not recall opening a Second Plan. (Tr. 50:22 - 52:15; 59:22-60:5.)

12. When asked whether the PA was opened in 2003, Dunn testified that he thought "there was an error;" that forms given to him by either his lawyers or accountants "make [him] nervous" and he "just sign[s] them." (Tr. 48:10 - 49:9.)

13. Indeed, prior to the execution of the Second Plan Agreement, an application was submitted to the Florida Department of State, Division of Corporations ("FL Department of State") for the registration of a profit corporation called "Allan R. Dunn, M.D., P.A."[2]

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[2] The Court takes judicial notice of the August 28, 2003 registration of "Allan R. Dunn, M.D., P.A." as a "Florida Profit

14. The Registered Agent Name for the PA was Defendant Dunn. The address given for the PA was Defendant Dunn's then and current business address.

15. The PA filed Annual Reports with the FL Department of State in 2004, 2005, 2006 and 2007--that is, every year from the date of its incorporation until the year the instant lawsuit was filed.

16. Defendant conducted business under the registered name Allan R. Dunn, M.D., P.A, from 2003 until 2007. Plaintiff was employed by that entity until her retirement and she was considered by Dr. Dunn to be a valuable employee. (Pl. Ex. 3.)

17. Plaintiff retired on May 13, 2005. When she announced her retirement to Defendant, he did not recall the Note. Plaintiff found the Note and presented it to Defendant, who still did not recall writing the Note, but admitted that it was written in his handwriting.

18. On the day of her retirement, Defendant provided Plaintiff with a check for $ 2600, drawn on his personal bank account, and indicating in the "memo" line that the check was for "Keogh Withdrawal." (Tr. 30-31, Pl. Ex. 2.)

19. After her retirement, Plaintiff contacted an attorney, who wrote to Dr. Dunn on February 9, 2006,

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Corporation." See Florida Department of State, Division of Corporations, available at sunbiz.org. Last accessed September 29, 2009.

requesting information on the Plan. (Pl. Ex. 4.) Specifically, Plaintiff's counsel requested "(1) Keogh Plan documentation with amendments; (2) annual statements and account record; (3) [Internal Revenue Service] Form 5500s; (4) Records of annual contributions; and (5) Participant Statement." (Id.)

20. Counsel for Plaintiff again wrote to Dr. Dunn (this time at both his business and home addresses) on March 2, 2006, requesting the same information. (Pl. Ex. 5.)

21. Defendant Dunn's daughter, Melissa Dunn, responded to Plaintiff's counsel, on June 12, 2006, with a memorandum that read: "Enclosed is First Union's Basic Plan Document that Dr. Dunn found." ("Dunn's Response"). (Pl. Ex. 6.)

22. Dunn's Response did not address the inquiries of Plaintiff's letters or provide the documentation requested therein. (Stip. P 6; Tr. 80:1-23.)

23. On May 28, 2008, ten months after commencement of this action, Dunn submitted to the Employees Benefit Security Administration eleven past-due Internal Revenue Service Forms 5500, for each year, beginning with 1995 and ending with 2005 (the "Form 5500s"). (Pl. Ex. 36 at 3; Tr. 65:1-8.)

24. The Form 5500s, filled out on behalf of the "Allan R, Dunn, M.D. Profit Sharing Plan," bore an Employer Identification Number identical to that used in the registration of the PA with the Florida Department of State. (Compare Tr. Ex. 36 at 4-14 with Judicial Notice

of Florida Department of State, Division of Corporations, available at sunbiz.org, cited supra n. 1.)

25. When asked whether, as a result of being subject to this ERISA action, he took any steps to insure that these IRS-mandated Form 5500s contained accurate information, Dunn responded: "[t]hey had arrows, 'sign here,' I sign here." (Tr. 65:9-12.). Dunn also testified that he "wouldn't know if [the forms] were accurate or not," and that "it's asinine to think that [he] would check them." (Tr. 68:1-8; 69:2-7.)

26. Defendant Dunn's submissions to the Employee Retirement Benefit Administration purported to include "appropriate schedules and attachments." (Tr. Ex. 36 at 4.) No schedules or attachments were provided to Plaintiff. (Tr. 28:16-29:3.)

27. As Plan Administrator and employer, Defendant Dunn understood that he was required to provide plan statements, including information on how the employees' investments were doing. (Tr. 69:21-25.) Defendant did not provide Plaintiff with annual statements or the status of her investment. (Tr. 69:3-9.) Indeed, Plaintiff received no Plan documentation. (Stip. P 3.)

28. Moreover, when Defendant Dunn claims he was "going broke," he withdrew funds from the account containing Plaintiff's retirement funds without informing her. (Tr. 72:21-73:1.) Dunn did not consider the withdrawal to be "any of [Plaintiff's] business." (Tr. 1-4.)

29. Defendant Dunn testified that after realizing his "mistake" in giving Plaintiff only the principal balance upon her retirement, he "immediately went to the accounts and . . . made a compound interest statement demonstrating every year, the 2 percent, 3 percent... of compound interest plus the principle and then another interest on top of that." (Tr. 84:1-6.)

30. As a result, Dr. Dunn wrote to Plaintiff's counsel on August 8, 2007, offering Plaintiff $456.00, representing what Dunn believed to be the interest due Plaintiff on the initial Plan deposit. (Tr. 84:1-4 ("2 percent, 3 percent, whatever").)[3]

31. The parties have stipulated that the amount due Plaintiff from the Plan was, as of December 31, 2007, $ 1,363.77.

CONCLUSIONS OF LAW

32. The Court has subject matter jurisdiction over the action, pursuant to 29 U.S.C. § 1001, et seq.

33. The Profit Sharing Plan is an "employee benefit pension plan" in that is a "plan, fund, or program which was heretofore . . . established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances . . . provides retirement income to employees." 29 U.S.C. § 1002(2)(A).

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[3] Dr. Dunn's offer of $ 456 in interest was dispatched to Plaintiff in August 2007, a month after the action was filed.

34. By the terms of the statute, "[t]he term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." See 29 U.S.C. § 1002(5). Given this definition, Dr. Dunn was Plaintiff's employer.

35. As Dr. Dunn executed the Second Plan agreement in the capacity of "owner," the PA also acted "in the interest of an employer in relation to an employee benefit plan" and is an employer under ERISA.

36. For ERISA purposes, an "administrator" is "the person specifically so designated" under the plan, or, in the absence of an explicit plan administrator, the "plan sponsor." 29 U.S.C. § 1002(16)(A).

37. As neither plan specifically designates an administrator, the Court must determine the identity of the "plan sponsor." A "plan sponsor," is "the employer in the case of an employee benefit plan established or maintained by a single employer." 29 U.S.C. § 1002(16)(B).

38. During Plaintiff's employment, funds held by Defendant Dunn on her behalf were placed in the Allan R. Dunn, M.D. Profit Sharing Plan.

39. Defendant Dunn, both individually as the owner the PA, identified himself as Plaintiff's employer on the plan agreements.

40. The Allan R. Dunn, M.D. Profit Sharing Plan is an

"employee benefit plan." 29 U.S.C. § 1002(3).

41. As a Plan Participant, Plaintiff was entitled to, *inter alia*, annual reports, any "instruments under which the plan is established or is operated;" pension benefit statements (including total benefits accrued) and certain financial statements relating to the Plan. See 29 U.S.C. §§ 1021(a); 1023(a)(1)(A)-(B); 1024(b); 1025(a)(2)(A)(i). If a Plan Participant requests any of these documents in writing, the administrator must provide them within 30 days to avoid being held personally liable. 29 U.S.C. § 1132(c)(1). It is undisputed that, on February 9, 2006, Plaintiff requested "annual statements and account records;" "records of annual contribution;" and "participant statement(s)." It is also undisputed that Defendants did not provide these documents to Plaintiff and, indeed, have not provided them to date. Defendants were required under ERISA to provide these documents.

42. It is within the Court's discretion to assess up to a $ 110 per day penalty to any administrator who fails to provide the required requested Plan information within 30 days of participant's written request. 29 C.F.R. § 2575.502c-1; *see also Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223, 1231-32 (11th Cir. 2002); *Disanto v. Wells Fargo & Co.*, 2007 U.S. Dist. LEXIS 62781, 2007 WL 2460732, at *14 (M.D. Fla. Aug. 24, 2007) ("Penalties under § 1132(c)(1) are not automatic."). "The penalty under § 1132 is meant to be in the nature of punitive damages, designed more for the purpose of punishing the violator than compensating the participant or beneficiary." *Scott*,

295 F.3d at 1232.

43. Where the information is furnished extremely late with no excusable oversight, that penalty may be required. *See, e.g., Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1494 (11th Cir. 1993) (district court erred in declining to impose a penalty where the statement of benefits was not delivered for approximately one year after written request and defendant's only explanation was that the delay was not intentional).

44. Factors to be considered when deciding the propriety and amount of penalty include the length and reason for the delay, bad faith, and prejudice to the participant. Compare *Cromer-Tyler v. Teitel*, 294 Fed. Appx. 504, 2008 WL 4335938, at *2 (11th Cir. 2008) (finding imposition of penalty sufficient based on four-year delay in supplying plaintiff with plan documentation); and *Doss-Clark v. Babies and Beyond Pediatrics, P.A.*, 2007 U.S. Dist. LEXIS 39483, 2007 WL 1577770, at *5 (M.D. Fla. May 31, 2007) (assessing $ 110 penalty per day where defendant knew plaintiff was suffering from cancer and ignored her information request); with Disanto, 2007 U.S. Dist. LEXIS 62781, 2007 WL 2460732, at *15 (declining to impose penalty for 33 day delay where no showing of "calculated" delay or bad faith).

45. The Court finds that the delays caused by Defendants in this case were calculated and in bad faith. Defendant made a deposit into the Plan on Plaintiff's behalf yet denied knowledge of the deposit once Plaintiff announced her retirement. After she provided evidence in the form of the Note, Dr. Dunn

then returned to her the exact amount deposited on her behalf, after over ten years of the accumulation of interest. He also filled out the Second Plan Agreement ambiguously, and further compounded the suspiciousness of that Agreement by denying the existence and use of a corporate registration which was valid at the time in question.

46. While Dunn claimed to not understand any financial or legal documents submitted to him by attorneys and accountants or required under the Plan and to summarily sign whatever documents were placed before him without even a cursory review, the Court finds it curious that, upon being sued, Dunn was able to collect bank statements and calculate what he deemed to be the compounded interest due Plaintiff. Moreover, the amount of interest he deemed applicable to Plaintiff's balance was "2 percent, 3 percent, whatever." This behavior evinces bad faith.

47. The Court finds that Dunn's testimony was not credible. In addition to the incredible claim that he mistakenly failed to realize that interest was due, Defendants still have yet to produce to Plaintiff the documents required under ERISA. Moreover, Dunn's testimony was evasive and petulant: despite having designated himself as the trustee of the Plan, he claimed it would be "asinine" to expect him to review the Form 5500s; stated there is no way he could understand financial forms ("Would you think that Tiger Woods could?"); and claimed that his withdrawal of the funds in the Plan was "none of [Plaintiff's]" business.

48. Therefore, given the volume of documentation requested and still outstanding, Section 1132's purpose in deterring administrator delays of precisely this sort, Dr. Dunn's incredible testimony and court demeanor, and the prejudice Plaintiff suffered by not knowing the status of her retirement plan or the amount of money intended for her, the Court finds that this is such an action where the maximum penalty permitted under law ought to be imposed. *See Cromer-Tyler*, 294 Fed. Appx. 504, 2008 WL 4335938, at *2; *Doss-Clark*, 2007 U.S. Dist. LEXIS 39483, 2007 WL 1577770, at *5; *see also Leister v. Dovetail, Inc.*, 546 F.3d 875, 881 (7th Cir. 2008) (Posner, J.) (failure to award penalty an abuse of discretion where bad faith and prejudice demonstrated) (citing *Daughtrey*, 3 F.3d at 1494-5); *Lowe v. McGraw-Hill Co.*, 361 F.3d 335, 338 (7th Cir. 2004) (Posner, J.) (penalty of $ 50 per day warranted where delay in providing plan information "egregious," caused plaintiff to hire a lawyer and "entangle[ed] him in litigation."); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 948 (8th Cir. 1999) ("The purpose of the penalty is to provide plan administrators with an incentive to timely respond to requests for documents.") Should Dunn or his PA ever again hold the position of administrator or trustee of an employee benefits plan, it is crucial that he understand the significance of these designations.

49. As stipulated to, Defendants are, as an initial matter, liable to Plaintiff in the amount of $1,363.77, representing the balance due as of December 31, 2007 (the "Unpaid Benefits").

50. Interest on the unpaid benefits is also in order.

While the Court may use 28 U.S.C. § 1961 to calculate pre-judgment interest, such reliance is not required. *Smith v. American Int'l Life Assurance Co.*, 50 F.3d 956, 958 (11th Cir. 1995).

51. Alternatively, "it is well within the court's discretion to look to the Florida statutory rate of interest in determining the appropriate pre-judgment interest rate." *Levinson v. Reliance Standard Life Ins. Co.*, 2000 U.S. Dist. LEXIS 19245, 2000 WL 193623, at *14 (S.D. Fla. Jan. 5, 2000). In accordance with Fl. Stat. §§ 687.01 and 55.03, the appropriate prejudgment interest rate in this case is 10% per annum, for the period of December 31, 2007 to the date of this judgment. *See Levinson*, 2000 U.S. Dist. LEXIS 19245, 2000 WL 193623, at * 14, n.17 (applying prejudgment interest at a rate of 10% where statutory interest rates for the years relevant to the action varied from 8-10%).

52. The Court holds Defendants liable for $ 110 per day, beginning March 12, 2006 (the first day that Plaintiff's written request for plan documentation became overdue, pursuant to 29 U.S.C. § 1132(c)) until the date of this order.

WHEREFORE, IT IS ORDRED THAT:

1. Plaintiff shall take $1,363.77, plus 10% per annum, calculable from December 31, 2007;

2. The parties shall have 10 days to calculate the correct amount of prejudgment interest and submit it to the court for approval;

3. Plaintiff shall take $110 per day beginning March 12, 2006 and ending on the date of this order;

4. The parties shall have 10 days to calculate the correct amount of the statutory penalty against Defendants and separately delineate such sum in the same order;

5. The court shall enter final judgment under separate order pursuant to Federal Rule of Civil Procedure 58. The parties shall have 10 days thereafter to object to any errors in the mathematical calculations in the order.

SO ORDERED.

Dated: September 30, 2009

Brooklyn, New York
/s/ Sterling Johnson, Jr.
Sterling Johnson, Jr., U.S.D.J.